

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

14 BEFORE THE COURT are cross-motions for summary judgment noted
15 for hearing without oral argument on September 15, 2008. (Ct.
16 Rec. 10, 12). Attorney Maureen J. Rosette represents Plaintiff;
17 Special Assistant United States Attorney David M. Blume represents
18 the Commissioner of Social Security ("Commissioner"). The parties
19 have consented to proceed before a magistrate judge. (Ct. Rec. 4.)
20 On September 3, 2008, plaintiff filed a reply. (Ct. Rec. 14.)
21 After reviewing the administrative record and the briefs filed by
22 the parties, the court **GRANTS** Defendant's Motion for Summary
23 Judgment (Ct. Rec. 12) and **DENIES** Plaintiff's Motion for Summary
24 Judgment (Ct. Rec. 10.)

JURISDICTION

26 Plaintiff filed an application for disability insurance
27 benefits (DIB) on September 21, 2004, alleging onset as of April
28 1, 1998. (Tr. 47-51.) The application was denied initially and

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

1 on reconsideration. (Tr. 41-42, 44-46.) Administrative Law Judge
 2 (ALJ) Richard A. Say held a hearing on August 25, 2006. (Tr. 287-
 3 315.) Plaintiff, represented by counsel, his spouse, and
 4 vocational expert Jill Dempsey testified. On September 12, 2006,
 5 the ALJ issued a decision finding that plaintiff was not disabled.
 6 (Tr. 24.) The Appeals Council denied a request for review on
 7 December 21, 2007. (Tr. 5-7.) Therefore, the ALJ's decision
 8 became the final decision of the Commissioner, which is appealable
 9 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
 10 filed this action for judicial review pursuant to 42 U.S.C. §
 11 405(g) on February 7, 2008. (Ct. Rec. 1.)

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing
 14 transcript, the ALJ's decision, the briefs of both Plaintiff and
 15 the Commissioner, and will only be summarized here.

16 Plaintiff was 37 years old at onset and 45 at the hearing.
 17 He has a high school education and has worked as a spring
 18 assembler, automobile mechanic's helper, commercial cleaner,
 19 kitchen helper, and repairer of automotive generators and
 20 starters. (Tr. 291, 307-308.) He suffered a back injury in March
 21 of 1993 and alleges disability as of April 1, 1998, due to back
 22 pain, left shoulder pain, and, as of 2001, HIV. (Tr. 53, 199.)
 23 Plaintiff testified he can sit for 10 to 15 minutes, stand 10
 24 minutes, walk about 100 yards, and lift 2 to 3 pounds. (Tr. 297-
 25 299.)

26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the "Act") defines "disability"
 28

1 as the "inability to engage in any substantial gainful activity by
2 reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or
4 can be expected to last for a continuous period of not less than
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
6 Act also provides that a Plaintiff shall be determined to be under
7 a disability only if any impairments are of such severity that a
8 plaintiff is not only unable to do previous work but cannot,
9 considering plaintiff's age, education and work experiences,
10 engage in any other substantial gainful work which exists in the
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
12 Thus, the definition of disability consists of both medical and
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
14 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled.
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
18 is engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
20 not, the decision maker proceeds to step two, which determines
21 whether plaintiff has a medically severe impairment or combination
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination
25 of impairments, the disability claim is denied. If the impairment
26 is severe, the evaluation proceeds to the third step, which
27 compares plaintiff's impairment with a number of listed
28

1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled.
6 If the impairment is not one conclusively presumed to be
7 disabling, the evaluation proceeds to the fourth step, which
8 determines whether the impairment prevents plaintiff from
9 performing work which was performed in the past. If a plaintiff
10 is able to perform previous work, that Plaintiff is deemed not
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
12 At this step, plaintiff's residual functional capacity ("RFC")
13 assessment is considered. If plaintiff cannot perform this work,
14 the fifth and final step in the process determines whether
15 plaintiff is able to perform other work in the national economy in
16 view of plaintiff's residual functional capacity, age, education
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.

21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. The burden
25 then shifts, at step five, to the Commissioner to show that (1)
26 plaintiff can perform other substantial gainful activity and (2) a
27 "significant number of jobs exist in the national economy" which
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1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

3 **STANDARD OF REVIEW**

4 Congress has provided a limited scope of judicial review of a
 5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 6 the Commissioner's decision, made through an ALJ, when the
 7 determination is not based on legal error and is supported by
 8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
 9 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 10 1999). "The [Commissioner's] determination that a plaintiff is
 11 not disabled will be upheld if the findings of fact are supported
 12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
 13 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
 14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
 15 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 18 573, 576 (9th Cir. 1988). Substantial evidence "means such
 19 evidence as a reasonable mind might accept as adequate to support
 20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 21 (citations omitted). "[S]uch inferences and conclusions as the
 22 [Commissioner] may reasonably draw from the evidence" will also be
 23 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965).
 24 On review, the Court considers the record as a whole, not just the
 25 evidence supporting the decision of the Commissioner. *Weetman v.*
 26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
 27 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

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1 It is the role of the trier of fact, not this Court, to
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
3 evidence supports more than one rational interpretation, the Court
4 may not substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
6 (9th Cir. 1984). Nevertheless, a decision supported by
7 substantial evidence will still be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the
9 decision. *Brawner v. Secretary of Health and Human Services*, 839
10 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
11 evidence to support the administrative findings, or if there is
12 conflicting evidence that will support a finding of either
13 disability or nondisability, the finding of the Commissioner is
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
15 1987).

ALJ'S FINDINGS

17 At the outset the ALJ found plaintiff was last insured
18 through December 31, 2001, for purposes of his DIB claim. (Tr.
19 18.) He was therefore required to establish disability prior to
20 this date. The ALJ found at step one that plaintiff has not
21 engaged in substantial gainful activity since onset. (Tr. 18.)
22 At steps two and three, the ALJ found that plaintiff suffers from
23 back pain and HIV, impairments that are severe but do not meet or
24 medically equal the requirements of the Listings¹. (Tr. 18-19.)

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26 The ALJ notes Listing 14.08A does not apply to HIV here because
27 there is no medical evidence of mycobacterium kansasii anywhere
28 except the lungs (Tr. 19, 119), an uncontested finding.

1 After finding plaintiff not fully credible, the ALJ determined
2 plaintiff has the RFC to perform a range of sedentary work. (Tr.
3 22.) At step four, the ALJ found a person with plaintiff's
4 impairments and background could not perform his past relevant
5 work. (Tr. 22.) At step five, relying on the vocational expert,
6 the ALJ found plaintiff is able to perform other work such as
7 final assembler and order clerk. (Tr. 23.) The ALJ found
8 plaintiff not disabled. (*Id.*)

9 **ISSUE**

10 Plaintiff contends that the Commissioner erred as a matter of
11 law when he assessed plaintiff's credibility; this in turn led to
12 an inadequate assessment of the medical evidence and plaintiff's
13 RFC. (Ct. Rec. 11 at 12-17.) The Commissioner responds that the
14 ALJ relied on medical evidence, as well as daily activities and
15 lack of motivation, when he found plaintiff less than fully
16 credible. The Commissioner asserts that because the ALJ's reasons
17 for the credibility determination are clear, convincing and
18 supported by the evidence, the assessment of the medical evidence
19 and RFC are also without error, and the court should affirm the
20 ALJ's decision. (Ct. Rec. 13 at 6-9.)

21 **DISCUSSION**

22 **Assessing plaintiff's credibility**

23 In social security proceedings, the claimant must prove the
24 existence of a physical or mental impairment by providing medical
25 evidence consisting of signs, symptoms, and laboratory findings;
26 the claimant's own statement of symptoms alone will not suffice.
27 20 C.F.R. § 416.908. The effects of all symptoms must be
28 evaluated on the basis of a medically determinable impairment

1 which can be shown to be the cause of the symptoms. 20 C.F.R. §
 2 416.929. Once medical evidence of an underlying impairment has
 3 been shown, medical findings are not required to support the
 4 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
 5 341, 345 (9th Cr. 1991).

6 The ALJ evaluated plaintiff's credibility and found him less
 7 than fully credible. (Tr. 20-21.) Credibility determinations
 8 bear on evaluations of medical evidence when an ALJ is presented
 9 with conflicting medical opinions or inconsistency between a
 10 claimant's subjective complaints and diagnosed condition. See
 11 *Webb v. Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

12 It is the province of the ALJ to make credibility
 13 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
 14 1995). However, the ALJ's findings must be supported by specific
 15 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
 16 Cir. 1990). Once the claimant produces medical evidence of an
 17 underlying medical impairment, the ALJ may not discredit testimony
 18 as to the severity of an impairment because it is unsupported by
 19 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
 20 1998). Absent affirmative evidence of malingering, the ALJ's
 21 reasons for rejecting the claimant's testimony must be "clear and
 22 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
 23 "General findings are insufficient: rather the ALJ must identify
 24 what testimony not credible and what evidence undermines the
 25 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
 26 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

27 The ALJ relied on several factors when he assessed
 28 credibility, including the April 26, 2001, report by treating

1 doctor Daniel Moullet, D.O., roughly five months before the date
2 plaintiff was last insured:

3 As you know, he is a 40-year old white male who
4 around the first of the year [2001] was found to
have an interstitial diffuse pneumonitis. Ultimately,
5 this was shown to be *Mycobacterium kansasii*. At that
time, he was found to be HIV positive with CD-4 count
6 of 10 and relatively high viral load. His *Mycobacterium*
7 *kansasii* was initially treated with five anti-
mycobacterial agents but has now been paired down to
8 isoniazid and rifampin. These medicines were stopped
on 3/05/01 and was [sic] switched to ethamutol and
Mycobutin. He was started on HIV medicines, Norvir,
Combivir and Agenerase. The Norvir only to potentiate
the Agenerase. He is also on preventative Diflucan and
Bactrim.

10 . . . Since initiation of the therapies he is tired and weak
11 but his shortness of breath and cough have improved markedly.
12 [Plaintiff] . . . denies headache. He has occasional nausea
with his medicine but does not have
13 a problem with vomiting or diarrhea. He has no rashes
14 . . .

15 [Plaintiff] smokes a pack of cigarettes a day.
16 . . . He does quite a bit of work around the house.

17 (Tr. 111, referred to by the ALJ at Tr. 20.)

18 The ALJ observes that nausea and vomiting do not appear
19 significant until 2005, four years after plaintiff's last insured
date. (Tr. 20, referring to Exhibit 8F at 3.) The ALJ is correct
20 that the medical evidence does not support plaintiff's statements
21 concerning the intensity, persistence and limiting effects of
22 symptoms of nausea and vomiting as alleged. Similarly, with
23 respect to back pain, the ALJ notes objective evidence prior to
24 the date last insured indicates only mild degenerative changes.

25 (Tr. 21, referring to Exhibit 6F/1, 1F/23, 24.) More than minimal
26 degenerative changes did not appear on an MRI until 2003 (Tr.
27 126), two years after the last insured date. The ALJ relies on
28 the 2005 MRI showing moderate degenerative changes (Tr. 21,

1 referring to Exhibit 10F/9-14), but because it also significantly
2 post-dates the last insured date, any error is harmless.

3 The ALJ noted the lack of any medical evidence supporting
4 plaintiff's complaint at the hearing of left shoulder pain. (Tr.
5 21, referring to Tr. 294-295.) In October of 1987, the ALJ points
6 out a treating physician reported decreased range of motion in
7 plaintiff's *right* shoulder. Plaintiff said it hurt for a couple of
8 days, he had been working on building his own home, and doing a
9 lot of chopping. (Tr. 21, citing Exhibit 5F/2 at Tr. 202.) The
10 ALJ accurately observes that there no medical evidence of a severe
11 impairment in either shoulder during the period at issue. (Tr.
12 21.)

13 The ALJ relied on plaintiff's inconsistent descriptions of
14 his daily activities. As noted in Dr. Moullet's April 2001
15 letter, eight months before plaintiff's insurance expired, he
16 reported he was doing a lot of work around the house. (Tr. 111.)
17 On May 10, 2001, plaintiff felt well. (Tr. 21, referring to
18 Exhibit 1F at 5.) It was not until September 27, 2001, that
19 plaintiff complained of severe fatigue, joint pain, and a burning
20 sensation in his face. (*Id.*, referring to Exhibit 1F at 7.) The
21 ALJ observes plaintiff did not complain of any of these symptoms
22 at the hearing. (Tr. 21.)

23 The ALJ relied on plaintiff's apparent poor motivation when
24 assessing credibility:

25 The claimant has also made statements to Dr. Moullet
26 about wanting to be declared disabled. In August of
27 2003, he told Dr. Moullet he wanted to be found disabled
he said was his occupation (Exhibit 2F/7). Dr. Moullet
explained to the claimant there was no significant
evidence of radiculopathy and that he did not meet the

1 criteria for disability (Exhibit 2F/7). Again in March
 2 of 2005, the claimant told Dr. Moullet he wanted to be
 3 declared disabled so he could 'go fishing and enjoy life
 4 a little bit.' When Dr. Moullet pointed out to the
 5 claimant that if he can fish then he can certainly work,
 the claimant stated 'he should just become a couch potato'
 (Exhibit 11F/4)[at Tr. 249]. This latter admission to Dr.
 Moullet is certainly an indication the claimant feels he
 can perform more physical activities than he alleges.

6 (Tr. 20-21.)

7 Not noted by the ALJ but consistent with his reasoning is the
 8 following notation by Dr. Moullet dated August 1, 2006:

9 "He [Plaintiff] thinks he is disabled, therefore he will not
 10 have to go out and get firewood this year or continue to work on
 11 engines, as he is a mechanic."

12 (Tr. 262.)

13 The ALJ's reasons for finding plaintiff less than fully
 14 credible are clear, convincing, and fully supported by the record.
 15 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
 16 2002)(proper factors include inconsistencies in plaintiff's
 17 statements, inconsistencies between statements and conduct, and
 18 extent of daily activities).

19 The ALJ is responsible for reviewing the evidence and
 20 resolving conflicts or ambiguities in testimony. *Magallanes v.*
Bowen, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
 22 trier of fact, not this court, to resolve conflicts in evidence.
Richardson, 402 U.S. at 400. The court has a limited role in
 24 determining whether the ALJ's decision is supported by substantial
 25 evidence and may not substitute its own judgment for that of the
 26 ALJ, even if it might justifiably have reached a different result
 27 upon de novo review. 42 U.S.C. § 405 (g).

28 The ALJ provided clear and convincing reasons for finding

1 plaintiff's allegations not fully credible. The ALJ's
2 assessment of the medical and other evidence is supported by
3 the record and free of legal error.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this
6 court finds that the ALJ's decision is free of legal error and
7 supported by substantial evidence..

8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 12**) is
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is
12 **DENIED.**

13 The District Court Executive is directed to file this Order,
14 provide copies to counsel for Plaintiff and Defendant, enter
15 judgment in favor of Defendant, and **CLOSE** this file.

16 DATED this 4th day of February, 2009.

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18
19 s/ James P. Hutton

20 JAMES P. HUTTON
21 UNITED STATES MAGISTRATE JUDGE

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